Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1936

FRANCIS E. RINEHART,

Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS AND THE SUPREME COURT, APPELLATE DIVISION OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

FRANCIS E. RINEHART
1025 Fifth Avenue
New York, New York 10028
(212) 861-6419
Appellant Pro Se

June, 1979

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THE OPINIONS BELOW

The Orders of the Appellate Division of the Supreme Court, First Judicial Department in the County of New York M-474, filed August 3, 1978, appointing a Referee and ordering hearings not later than thirty days; M-3009, filed

September 19, 1978 adhering to its original decision as contained in the order entered August 4, 1978; M-474A and M-3009A, filed December 7, 1978, recalling and vacating sua sponte the orders entered on August 3, 1978 and September 19, 1978, respectively, and ordering that the name of Francis E. Rinehart be stricken from the roll of attorneys and counselors-at-law in the State of New York; M-4103, filed December 7,1978, denying a prompt hearing; M-4057, filed December 7, 1978, denying a motion to vacate the order entered on August 3, 1978; M-4594, filed February 6, 1979, denying reargument of motions Nos. M-474A,M-3009A, M-4103 and M-4057; and the opinion on motion No.474- (M-3009) of the Appellate Division of the Supreme Court for the First Judicial Department, delivered December 7, 1978, appear herein as Appendix A. No other written opinion has been delivered. Order M-885, filed April 19, 1979, by the Appellate Division of the Supreme Court for the First Judicial Department, denying leave to appeal to the Court of Appeals from the orders entered on December 7, 1978 (Orders Nos. M-4057, M-474A, M-3009A and M-4103) and on February 6, 1979 (Order No. M-4594) also appears herein as Appendix A.

Appendix A also contains:Orders of the New York Court of Appeals, Mo. No., 228, filed March 29, 1979, denying appeal from orders of the Appellate Division dated December 7, 1978 disposing of that court's motions No. 4103 and No. 4057, upon the ground that the orders do not finally determine the proceedings within the meaning of the Constitution, denying appeal from motions M-474A and M 3009A on the ground that no substantial constitutional question is directly involved, denying appeal from the Appellate Division order dated December 7, 1978 disposing of motions M 474A and M 3009A and denying a stay; order on Mo.No. 228, filed April 3, 1979, denying appeal from an order of the Appellate Division dated February 6, 1979 denying reargument M-4594 upon the ground that the order does not finally determine the proceeding within the meaning of the Constitution.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Appellant's constitutional rights have been denied him by the State of New York. Appellant has been deprived of his property without due process of law (5th Amendment) and the State has made or enforced a law which abridges the appellant's privileges or immunities as a citizen of the United States and has deprived him of property without due process of law and denied him, as a person within its jurisdiction, the equal protection of the laws.(14th Amendment). It has also violated appellant's rights under Article 1, section 7, clause 1, Article III, section 2, clause 3, and under the 6th, 8th, 10th and 16th Amendments.

The effect of the denial has been automatically to disbar a reputable attorney, who has been a member of the bar for over twenty five years, because of a feud he had with the Internal Revenue Service in which there was no conduct involving dishonesty, fraud or deceit. The power of the Internal Revenue Service and the Justice Department in such a feud is awesome. It became impossible for an individual dependent upon earnings from

his personal services to continue. For in addition to the heavy costs of fees to defense counsel in thousands of dollars, all possible work was being foreclosed by the Service and the Department going to the taxpayer's friends, employees and former employees, former clients, employers present clients and employers and possible future clients and employers. The result was a rationalization by the appellant that he knew of the doctrine of constructive receipt and when he knowingly omitted from his 1971 return checks for a fee which he returned in the same year, and which was put into escrow by the debtor's request to a probate court, this was a possible violation of 26 USC section 7206(1) justifying a guilty plea.

The New York State Court of Appeals states that no substantial constitutional question is directly involved in foreclosing the discretion of the Supreme Court Appellate Division to grant an attorney a hearing in an Association of the Bar of the City of New York disciplinary proceeding to evaluate the particular conduct involved in a Federal personal income tax offense, 26 USC section 7206(1), which would not be a felony under New York State personal income tax law, and holds that in such case disbarment is auto-

matic upon presentation of a certified copy of judgment of conviction to the Appellate Division by Bar Counsel. This is an appeal from such judgment. It is also an appeal from the disbarment order of the Appellate Division complying with such Court of Appeals judgment.

It has long been the law in New York that only where an attorney is convicted of a crime deemed to be a felony under New York law is the discretion of the Appellate Division foreclosed. In re Keogh, 1966, 25 A.D.2d 499, 267 N.Y.S.2d 87; Matter of Donegan, 282 N.Y. 285.

In 1977, in Matter of Chu, 42 N.Y. 2d 490, the Court of Appeals held that, under subdivision 4 of section 90 of the Judiciary Law, conviction of a federal felony works an automatic disbarment in New York State of a defendant attorney and that it is immaterial that there is no felony analogous under the New York State statutes matching the federal felony, noting that this marked a significant departure from its prior holding in Matter of Donegan.* In Chu the Court of Appeals

* Donegan holds here that a federal judgment of conviction of a crime which is a felony under federal law but only a misdemeanor under New York Law must be treated as a misdemeanor.

concluded "that the conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment.*** We now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline." (pp 493-494).

The question posed in the case at bar is whether appellant who pleaded guilty to 26 USC section 7206(1), a federal felony not substantially similar to a New York felony, was automatically disbarred by virtue of Chu under Subdivision 4, Section 90, of the Judiciary Law, or whether he was not disbarred automatically under Subdivision 4 but, instead, is now sunject to discretionary disciplinary sanctions of the Appellate Division under Subdivision 2 of Section 90 of the Judiciary Law.*

* The Judiciary Law commits to the Appellate Division in full measure responsibility for admission to and removal from practice. (Judicial Law, section 90, subd. 2). Only in the case of conviction of felony, however, is resort to its discretion foreclosed. (Judiciary Law, section 90, subd. 4).

It was the opinion of the Appellate Division that Chu could reasonably be interpreted to allow discretion in some cases of federal felony for evaluation of the particular conduct involved in the offense and the court accordingly granted appellant a hearing on August 3, 1978 to be held on a date and time to be fixed by the petitioner, the Bar Association, after consultation with the referee appointed by the court, but not later than thirty days from August 3, 1978.

Instead of fixing a hearing date, petitioner Bar counsel moved for a reargument and upon reargument the court adhered to its original decision by order entered September 19, 1978. The hearing was finally set for October 25, 1978. About ten o'clock in the morning of October 24th, the office of the Bar counsel telephoned defendant that the hearing was cancelled and that the caller did not know why but that Bar counsel had left his office sick the night before. On reaching the Referee at his home by telephone about six in evening the Referee said the attorney handling the matter for the Bar Association had called in sick and that the hearing would be postponed and the parties notified when a new date was set. When Bar counsel was reached by phone the following morning he stated the reason for

the cancellation was a new decision by the Court of Appeals reported in the past Friday's Law Journal, Matter of Thies, and that he would appeal again to the Appellate Division to reargue his motion and that accordingly no hearing could be had until his motion was heard. Appellant had no objection to a short postponement for illness but did object to cancellation for further argument. On reaching the Referee the same morning, he admitted that he had been told of the Thies case by Bar counsel and had cancelled the hearing for that reason.

The majority opinion in Thies, 44 N.Y.2d 950, decided October 19, 1978, held that since the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld, if consideration should be given to the gravity of the offense and to mitigating circumstances in federal offense, on principle this would seem to be equally true with respect to convictions for New York felonies and this is not the case.*

The three dissenting judges in a separate opinion stated that the decision of the majority may be viewed only as a direct overruling of Donegan and the establish-

* In fact it is. The Legislature has done it.

ment of a per se rule which compels the summary disbarment of a New York attorney convicted of any felony in a federal court in this state or any other state regardless of whether the New York Legislature has denominated the offense as felonious and no longer may consideration be given to the gravity of the offense and mitigating circumstances, no matter how compelling; the drastic result is fixed. This inflexibly harsh rule needlessly rejects the principle that firm discipline can be achieved without sacrificing fairness and reason. The abberational results which the determination will bring may now be avoided only by legislative action unless this Court intervenes.

The Appellate Division on December 7, 1978 stated that it was that court's view that Chu could reasonably be interpreted to allow discretion in some cases for evaluation of the particular conduct involved in a federal offense but that Thies is quite clearly to the contrary. Accordingly the court on December 7, 1978 recalled and vacated, sua sponte, its orders of August 3, 1978 and September 19, 1978 and granted petitioner's motion directing that appellant's name be stricken from the roll of attorneys and

counselors-at-law in the State of New York pursuant to subdivision 4 of section 90 of the Judiciary Law of the State of New York.

The New York statute, Section 90 subd. 4, of the Judiciary Law, and the federal statute, 26 USC section 7206(1), so interpreted are invalid to deny discretion to the Appellate Division under the facts and circumstances of appellant's case to allow appellant a hearing and to compel the court to revoke a hearing granted. Such summary action is repugnant to the Fifth and Fourteenth Amendments to the Constitution and violates the principles set forth in Article I, section 7, clause 1, Article III, section 2, clause 3, the Sixth Amendment, the Eighth Amendment, the Sixteenth Amendment, and that of fair play inherent in Anglo-American law. Appellee itself in a memorandum submited to the Appellate Division in this very case states: "This Committee does not favor automatic disbarment for every Federal felony." The action with respect to appellant is essentially arbitrary and without reasonable basis and such unreasonable and arbitrary action is the denial of due process. The decisions of the Court of Appeals and the Appellate Division were in favor of the validity of the statute so interpreted.

The judgments sought to be reviewed are the orders of the Court of Appeals filed March 29, 1979 and April 3, 1979, Mo. No. 228, and the orders of the Appellate Division filed December 7, 1978, February 6, 1979 and April 19, 1979, M-474A and M-3009A, M-4103, M-4594 and M-885. The orders M-474A and M-3009A recalled and vacated sua sponte orders entered August 3, 1978 and September 19, 1978 granting a hearing and instead ordered summary disbarment. The notice of appeal was filed with the Court of Appeals and the Appellate Division, First Department, one or the other court being possessed of the record. The notices were filed May 3, 1979. Notice of motion for reargument was filed with both the Court of Appeals and the Appellate Division on April 30, 1979. Both motions have been denied.

Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, section 1257(2).

Cases sustaining the jurisdiction of this Court are:

Application of Gault, 87 S.Ct. 1428(1967)
Giaccio v. Pennsylvania, 382 U.S.399(1966)
Hoyt v. Florida, 368 U.S.57 (1961)
Ferguson v. Georgia, 365 U.S. 570 (1961)

STATUTES INVOLVED

The validity of subdivision 4, section 90 of the Judiciary Law of the State of New York and 26 USC section 7206(1) is involved. The full text of these is as follows:

Section 90 Judiciary Law

"4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the Appellate Division of the Supreme Court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

26 USC section 7206(1)

" Any person who -

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

QUESTION PRESENTED BY THIS APPEAL

The following question is presented by this appeal:

Does a state statute that denies, by an interpretation subsequent to the granting of a hearing, the right to a hearing granted by a court after full presentation by the parties and due consideration and exercise by the court of its discretion to determine the gravity of the offense and the compelling mitigating circumstances in a disciplinary proceeding against an attorney, and imposes automatic disbarment for conviction of a felony in a federal court in another state, regardless of whether the legislature of the state enacting the state statute has denominated the offense as felonious, violate the Constitution of the United States where the federal felony is 26 USC section 7206(1) interpreted in the conviction as imposing liability without fraud being involved?

STATEMENT OF THE FACTS OF THE CASE

Francis E. Rinehart, appellant herein, is a citizen of the United States. He was admitted to practice as an attorney in the State of New York on June 24, 1953, at a term of the Appellate Division of the Supreme Court, Second Judicial Department. He has had an excellent reputation as an attorney specializing primarily in tax work and natural resources.

In 1957, appellant joined the corporate legal department of Newmont Mining Corporation after being an associate in a Wall Street law firm. He acted as assistant legal counsel for Newmont until November 1971 when he left. During this period he had some private clients as well. His federal income tax returns for every year from 1965 through 1972 were audited by the Internal Revenue Service and there was a continual running dispute. The Internal Revenue Service asserted that appellant was entitled to no deductions for business expenses because be was not engaged in a trade or business but only a corporate employee. However, it taxed all income received or deemed constructively received as income from a trade or business.

As a result appellant made a practice of overpaying his taxes before the tax was due. This was done by having overwithholding from his salary by Newmont. Disallowance of all business expenses for all these years resulted in neither the government nor the taxpayer knowing what the true tax liability is. To determine this appellant has filed a petition with the Tax Court of the United States.

In April 1977, a Two-Count Information was filed against appellant in the Federal District Court in Boston alleging that he willfully and knowingly subscribed to a joint federal income tax return which he did not believe to be true and correct as to every material matter, the First Count being for the calendar year 1970, and the Second Count being for the calendar year 1971.

Because the statute of limitations was about to run on the year 1970, the Government attorney was telephoning and subpoening to appear before a Grand Jury in Boston in April 1977 numerous former clients od appellant and friends. Appellant, in addition to being hard pressed financially to continue to pay large legal fees for defense counsel and by loss of work and clients because of the tax involvement, did not wish these people to be put to the inconvenience

and embarrassment of appearing as witnesses. Accordingly, appellant waived an indictment and on April 11, 1977 before Judge W. Arthur Garrity, pled guilty to Count 2 of the Information. Count I was later dismissed by the Government. On appellant's plea, the Court fined him $5,000 and gave him a suspended sentence.

Count Two of the Information states:

"That on or about the 15th day of April, 1972, in the District of Massachusetts, FRANCIS E. RINEHART, a resident of the District of Massachusetts, did wilfully and knowingly make and subscribe to a joint federal income tax return for the calendar year 1971 on behalf of himself and his wife which was verified by a written declaration that it was made under the penalties of perjury, and that it was filed with the District Director in the District of Massachusetts, which said joint return on behalf of himself and his wife he did not believe to be true and correct as to every material matter in that the said joint income tax return on behalf of himself and his wife stated that the taxable income of FRANCIS E. RINEHART and his wife for the calendar year 1971 was in the amount of $32,201.91; whereas, as he then and there well knew and believed, the taxable income of FRANCIS E. RINEHART and his wife for the calendar year 1971 was in the amount of $83,719.47, in violation of Section 7206(1) of the Internal Revenue Code; Title 26, United States Code, section 7206(1)."

For the taxable year 1971, the dispute centered around four items in the appellant's tax return. Of the $51,517.56 difference, $36,375.42 was a fee which was paid by an estate of Boyce Downey, alias Peggy Downey, late of New Haven, Connecticut; $1,200 were director's fees from corporations which appellant had not reported; $3,772.34 was a New York tax refund for a previous year which he had not reported; and $10,149.80 was income which the Service contends appellant should have reported as ordinary income from stock options rather than treating it as capital gain.

Boyce Downey was one of appellant's clients. Her grandfather founded Newmont. She died May 21, 1964. Appellant functioned as attorney to one of the three executors of the estate, Fred Searls, Jr., Chairman of the Board of Newmont. There was considerable controversy between appellant and the executor whom he represented on the one hand and the other two executors and their attorneys on the other, one of the executors being the second husband of the decedent who was represented by a New York lawyer and a Connecticut lawyer. The administration of the estate was carried on under the jurisdiction of the Connecticut courts, although appellant urged that as a matter of law the

decedent was a domicilary of New York State.

While there were three attorneys involved representing the different executors, the great bulk of the actual work of administration was done by the appellant. There was a serious problem in connection with the Federal Estate Tax Return in this estate because it contained many shares of Newmont stock. Appellant enabled the estate to save several hundred thousand dollars by his knowledge of taxes in handling the redemption of the Newmont stock.

A dispute arose as to appellant's fee. In 1971 he claimed he was entitled to an additional fee of $155,000 having received in prior years $95,000 in payments on account which were subject to refunding and were to be applied against the final fee. On June 14, 1971, the administrators of the estate, the executor represented by appellant being then dead, sent by mail to appellant checks in the following amounts: $36,375.42 for services to the estate; $4,778.57 for services to the Morton Downey Trust; $4,304.33 for services to the Catherine Hohenlohe Trust; and $4,304.33 for services to the Christian Hohenlohe Trust, these being testamentary trusts for the surviving husband and children of the decedent.

The two remaining executors stated that this was all they would pay and that the checks were in full and final settlement and satisfaction of all fees due appellant. Since appellant had previously submitted a statement for $250,000 for all services and disbursements to the estate, the trusts and individuals, he refused to accept the checks and in fact mailed the checks back to the estate when he received them in 1971. Later, he returned the previous payments of $95,000 to the estate and when the estate refused to accept them and returned them to appellant he reported and paid tax on them. The administrators of the estate filed an account with the New Haven Probate Court and this account was allowed. When appellant returned the $36,375.42 check and the three checks for services to the trusts to the estate in 1971, the administrators then filed a petition to have a special administrator appointed to hold the $36,375.42 and this money was deposited with the special administrator in Connecticut to hold for appellant. The trustees of the trusts opened savings accounts and deposited the funds from the returned trust checks in these accounts.

Appellant did not appeal the decision allowing the account because in his

opinion this was the wrong venue since he had been retained in New York, the decedent was domiciled in New York, and the work performed by appellant was done in New York principally. Appellant did send an affidavit to the court stating that he could not receive a fair hearing there based upon his treatment by the court and stating that he was entitled to be paid more than the other lawyers involved. Appellant still has not accepted or taken the fee proposed for to take it would jeopardize his claim for the higher amount. The funds have remained in the name of the administrator appointed to hold the fee in Connecticut. Likewise, nor has appellant accepted or taken the fees offered for the trusts for the same reason and these funds have remained with the trustees presumably in bank accounts in New York.

Whatever would be the technical legality of failing to report as income the checks received and returned in 1971, there was no fraud involved and appellant did not engage in conduct involving dishonesty, fraud or deceit. In fact, since the money was received and returned in the same year, if in fact it is to be treated as constructively received in 1971, there would be clearly

an offsetting deduction in the total amount of the checks in the same year, thus resulting in a transaction that could not possibly affect tax liability in 1971.

The issue of the $10,149.80 revolved around the question of stock options which appellant had for stock in Newmont. Appellant had used the date when the options were granted, rather than the date that they were exercised in computing the period that he had held the options. Under the Internal Revenue Code if the stock had not been held for three years, a capital gain could not be taken. This was simply a mistake in using the wrong date, and in the past on other returns appellant had in fact reported money from stock options on a Schedule C, and had reported them as ordinary income.

At the Disposition before Judge Garrity, Judge Garrity did state that the matter which was most troublesome to him had to do with the stock options, and that the Court was trying to endeavor to determine to what extent if at all there was any fraud involved. Judge Garrity indicated that the presence or absence of fraud would be of considerable significance as to whether he would impose a jail sentence. Apparently,

Judge Garrity was satisfied with the explanation appellant gave him, that he had reported this in earlier years as ordinary income, and that this was merely an error on his part in this particular year. Judge Garrity concluded that the reason he was not imposing a jail sentence was that he felt that the dispute in the appellant's case was closer to a civil dispute, and that he did not think that the case involving appellant was a fraud case, and that he felt it was a situation where the appellant was a stubborn taxpayer involved in a dispute with an Internal Revenue Service that was not prepared to cope with stubborness. Judge Garrity termed the appellant's case more of a case of a feud between the taxpayer and the I.R.S. in a case where the taxpayer had disputed liabilities which perhaps should not have been disputed.

The omission of the two other items in appellant's 1971 return were clearly through oversight; the $1,200 in director's fees and the New York State income tax refund of $3,772.34. All director's fees had been reported on returns prior to the omission in the 1970 and 1971 returns. Appellant believes the form was changed in these years. The fees were a series of small ones and were used

without depositing so they did not show up on appellant's bank statements from which he personally prepared his returns. As to the New York State income tax refund, these resulted from the overwithholding of taxes by Newmont as requested by appellant to avoid federal deficiencies from more arbitrary disallowances of business expenses. Appellant, although not in the habit of receiving state income tax refunds previously should have known that they should be reported if appellant had benefited by deducting the taxes in prior years. It may be doubted, however, that if all business expense had properly been allowed whether the New York State taxes refunded would have resulted in a tax benefit in the year they were paid as taxes.

Tax collection was not involved in the entire case. Appellant had authorized overwithholding from his salary to avoid tax deficiencies. Overwithholdings were not credited as offsets to deficiencies asserted. As soon as appellant could he filed amended returns eliminating all business expense and including income asserted by the auditing agent and paying additional tax. Amended returns were thus filed in 1974 for all years under audit then (1969-1972) in a futile attempt to end an interminable audit. At the

same time the Service was claiming more tax was owing it was sending appellant tax refunds. On May 29, 1972, appellant was notified that he had overpaid his 1971 tax and a $12,417.76 refund was sent him. In June 1970 a similar refund was received for overpayment of $15,539.58. Finally, on May 29, 1978 appellant received notice of tax decrease of $14,325.56 and reduction of interest previously charged of $4,823.17 and a refund check for $19,148.73 for the year 1971 plus $8,015.98 for 1969, $2,270.81 for 1970, and $26,758.55 for 1972. Early in the audit appellant agreed to all the disallowances and corrections suggested by the agent. The special agent added nothing other than constructive receipt of the Downey estate fee in 1971. The investigation cost appellant severely in lost job opportunities and embarrassment.

The gravamen of the criminal case was that appellant wilfully made and subscribed a return which he did not believe to be true and correct as to every material matter and that this violated Section 7206(1). Appellant admited and intended to admit only that his return for 1971 did not include as income the estate payments received and returned in the same year and that he knew of the omission and of the doctrine of

constructive receipt.

No fraud was involved. There was no intent to evade a payment of tax or to violate any duty to file a correct return. The tax collector has not been misled and has lost no tax and it was never intended that he should. The advice of Boston tax counsel representing appellant, the opinion of appellant, and the knowledge available at the time was that section 7206(1) requires no fraud and can be violated by omitting income received and returned in the same year under the doctrine of constructive receipt. Under such construction, the Service does not have to prove fraud or any intent to evade tax due and owing, only that the return was signed and the signer did not believe it to be true and correct as to every material matter. The example given by Boston counsel was that any knowing omission violated the statute even the omission of the proper address, and that knowing of the doctrine of constructive receipt and omitting income which could be deemed to have been constructively received could violate section 7206(1). This was apparently the opinion of opposing counsel and of the court as well. The Court found no fraud involved yet held the statute was violated.

Moreover, in a hearing before his peers in a Massachusetts Bar proceeding, appellant also being admitted to practice in Massachusetts and Kentucky, the hearing committee found that appellant did not engage in conduct involving dishonesty, fraud or deceit and agreed with the District Court that the case was that of a stubborn taxpayer involved in a feud with the Internal Revenue Service. The Supreme Judicial Court for Suffolk County in Massachusetts also stated "it seems clear that the sentencing judge treated the statute as imposing liability without fraud." Kentucky like New York, summarily disbarred appellant without a hearing.

The Findings of Fact of the Hearing Committee Report to the Board of Bar Overseers in Massachusetts states:

> "The respondent, Francis E. Rinehart, did subscribe to and file a joint Federal income tax return for the calendar year 1971 verified under the penalties of perjury which was not true and correct in every material particular. He freely pled guilty to Count 2, and he certainly knew that the return was not true and correct in every material particular when he signed it and sent it in.
>
> The Committee agrees with Judge Garrity that this case is not the typical tax fraud case, but is more a case of an inordinately stubborn taxpayer involved in a feud with the Internal Revenue Service. The Committee

further feels that the respondent did much to bring about his own difficulties through the manner in which he continued to handle his tax disputes with the Government, never consulting an attorney, apparently never appealing the revenue agent's various decisions to Internal Revenue conferences, the filing of returns in 1970 and 1971 which were not carefully and accruately prepared, after having been involved in audit disputes for several years; and his peculiar stubborness, almost bordering on contempt, in refusing to accept the Downey money and yet refusing to protect his rights before the Court in New Haven, and putting himself in the position where it was deemed he had constructive receipt of this money.

The Committee does not believe that he engaged in conduct involving dishonesty, fraud or deceit, but he did plead guilty to a Federal offense, and did subscribe to a joint Federal return under oath which he knew was not true and correct in every material particular.

The Committee does not believe that he should be disbarred, but does believe that he should be suspended from the practice of law and should not be permitted to reapply for a period of ten months from the time of his original suspension."

No one, including ccunsel for appellee ,the Appellate Division, or the Court of Appeals appears to know what "felony" appellant committed for application of the <u>per se</u> disbarment rule. Bar counsel in a memorandum to the Court of Appeals alleges:

"Respondent-Appellant was convicted of income tax fraud, a federal felony, in violation of 26 USC section 7206(1).

" It should be noted that in the present case Repondent-Appellant was convicted of income tax fraud."

The Appellate Division in its orders appealed from characterizes 26 USC section 7206(1) as "fraudulently" filing a federal income tax return.

Certainly the "felony" that was admitted to - the omission from his 1971 return of checks returned uncashed in the same year - is not that which appears now asserted. It appears that what is asserted is in fact the fraud statute 26USC 7201 for an attempt to evade or defeat tax. It would appear that this would automatically follow from an understatement of taxable income but in the instant case this is not the fact. The transcript of the proceedings before the District Court on April 11, 1977 states:

" THE COURT: Let me ask preliminarily, Mr. Hollingsworth, I certainly do not question the government's proceeding under 7206(1), but if there is an allegation of an understatement of taxable income, I am just not aware of why it would not also follow automatically that there would be an understatement of tax. This is a little different than the 7206(1) cases that I recall having seen, and basically why isn't a 7602 --

MR. HOLLINGSWORTH: 7201, your Honor.

THE COURT: --- 7201 charge here alleged?

MR. HOLLINGSWORTH: Every once in awhile, your Honor, the Justice Department, for one reason or another, will take a matter, send it to us, rather than a prosecution under straight evasion, Section 7201, will recommend that we proceed under Section 7206(1).

I had the same question that the Court has. However, it is under the circumstances -- I consider it a reasonable approach on behalf of the Justice Department.

THE COURT: I said originally I do not quarrel with the government's selection of the section here. I just did not know whether there was an peculiar aspect of the case that prevented 7201 allegations where taxable income leads to the next step of tax due and owing. In some cases you have a misstatement as to, let's say, rents or a misstatement as to a loss, or something of that nature, which does not translate itself into taxable income, but here, where you are alleging an understatement of taxable income, it would seem to me that the 7201 charge would follow automatically, but I may be mistaken.

MR. HOLLINGSWORTH: Well, they could have been brought, your Honor, but the case does have certain peculiarities that I will explain in a minute.

THE COURT: Well, all right, please do that.

MR. HOLLINGSWORTH: Therefore, I am in accord with the Justice Department's directive that we proceed under 7206(1)."

When questioned by appellant, Mr. Hollingsworth said that a directive from the Justice Department to all field offices

prevented him from proceeding under section 7207 (which provides for a misdemeanor for any person who wilfully delivers a return to the Internal Revenue Service known by him to be false as to any material matter) because of a constitutional question that had been raised with respect to this section but with which he was not familiar.

There is no statute similar to section 7206(1) in the New York State income tax law. Indeed, the state statute Section 695, attempt to evade tax, similar to the federal evasion statute section 7201 does not provide a felony but only a misdemeanor. Nor is there any reason to believe that had the New York legislature enacted a statute like section 7206(1) it would have denominated the offense felonious when the statute it has enacted against evasion provides only a misdemeanor.

The fees returned, like ferae naturae, have never been reduced to possession. To claim them would have prejudiced appellant's claim for the greater amount due. W.I. Bones 4 TC 415 (acq.). To be taxed upon them may be constitutional but certainly to create a constructive felony with automatic disbarment is not. It does not fall within the powers granted under the Sixteenth Amendment nor those reserved to the States under the Tenth.

Stripped of any dishonesty, fraud or deceit and any intention to evade tax is 26 USC 7206(1) a "felony" within the meaning and intent of Section 90 subdivision 4 of the Judiciary Law? So interpreted, the Court of Appeals compelled the Appellate Division to recall its orders appointing a Referee and ordering a prompt hearing. This was after a hearing was schedule and the unagreed cancellation of the hearing. Fairness and reason were sacrificed. The harsh rule denied discretion to the Appellate Division to carry out its finding that a hearing was proper to determine the gravity of the offense where the mitigating circumstances were compelling. This despite that the hearing committee in the state where the offense occurred determined that disbarment was not called for. It is not unreasonable to believe that the same result would have been reached in New York. The matter of a hearing or not is therefore not moot.

Appellant is not trying collaterally to attack his conviction. He is not running afoul of the holding in Matter of Levy, 37 N.Y. 2d 279 (1975). The offense was a federal one. It involved no other. It involved a complex and little understood statute. Appellant was denied the protection of the New York legislature to its residents

to judge the gravity of the offense and the reason to disregard any mitigating circumstances. This has been done with respect to New York felonies. There is no intelligent exercise by the State of its police power. Nor is there anything in the nature of a jury trial by a man's peers to determine professional conduct that justifies denial of the right to work at a life long occupation because of the harm to others.

Judiciary Law Section 90 (2) gives the Appellate Division authority to censure, suspend or disbar any attorney who is guilty of professional misconduct or any misdemeanor. Section 691.7 of the Court's rules provide for disciplinary proceedings upon receipt of a certificate that the attorney has been convicted of a serious crime in any state. Serious crime is defined to include any felony not resulting in automatic disbarment and certain lesser crimes including wilful failure to file income tax returns. At the time of appellant's conviction a review of the cases contained in note 148 to Judiciary Law section 90 showed that in every case pleas of nolo contendere or guilty to charges of failure to file or filing false or fraudulent federal returns were held to be misdemeanors warrant-

ing only censure. Matter of Longo, 1976, 51 A.D. 2d 20; In re Dagher, 1975, 48 A.D. 2d 512; In re McNiff, 1975, 48 A.D. 2d 408; In re Hoffman, 1975, 48 A.D.2d 81; In re Harrison, 1975, 47 A.D.2d 259; In re McKneally, 1974, 44 A.D.2d 81; In re Schulman, 1973, 40 A.D.2d 381; In re Stevenson, 1972, 39 A.D.2d 355; and In re Impellizzeri, 1968, 31 A.D.2d 134. The prejudicial atmosphere that has resulted from attorneys in high government positions being involved in scandals has resulted in the adoption of an arbitrary and unreasonable harsh per se rule of summary disbarment and the applying of this rule retroactively to proceedings already underway. This is clearly contrary to every notion of due process.

Whether a state statute may make disbarment automatic for felonies involving scienter, moral turpitude, dishonesty, fraud, deceit or misrepresentation or any other conduct that adversely reflects on the fitness to practice law is not here in issue. The Massachusetts hearing has determined that this did not occur in appellant's case.*

* Disciplinary Rule 1-102 of the American Bar Association Code of Professional Responsibility provides that a lawyer shall not engage in illegal conduct involving moral turpitude or engage in conduct involving dishonesty, fraud, deceit or misrepresentation or engage in anyconduct that adversely reflects on his fitness to practice law.

The disciplinary judgment of another state should, absent some defense sufficient to support a collareal attack, be treated as conclusively establishing the facts adjudicated in the sister state. Tseung Chu Cornell, (9th Cir.,1957), 247 F.2d 929; Jordan v. DeGeorge, 341 U.S. 223, (1951). In Matter of Needleman, 63 A.D.2d 216, 1978, and Matter of Kaufman, 62 A.D. 2d 134 (1st Dept. 1978), it was held that automatic disbarment was mandated for violation of federal statutes not similar to New York felonies where fraud is present. However, even in such felonies the court in Needleman said that automatic disbarment should be mandatory "absent compelling, mitigating circumstances of substantial merit."

Everyone seems to agree that the perspective with which a professional disciplinary proceeding is approached is the protection of the public and not the imposition of further individual punishment. Matter of Levy, 37 N.Y.2d 279; Matter of Chu, 42 N.Y.2d 490(1977); Fleming v. Nestor, 363 U.S. 603, 616 (1959); In Matter of Mitchell, 40 N.Y.2d 153 (1976). The best protection of the public is a hearing where compelling, mitigating circumstances of substantial merit have been demonstrated. Automatic disbarment

in such a case is arbitrary and without reasonable basis and is a denial of due process. It does not enhance the integrity of the bar with the public to deny lawyers the rights that any other citizen in any other profession would have. They too must expect fair and just discipline and for the state alone to be the judge of the relationship between the individual's conduct and his fitness to work at his profession.

It is improper delegation for a state to delegate to Congress the right to determine who may practice law in the state. Such power is not delegated to another state. Offenses of the most serious nature in other states do not automatically disbar an attorney practicing in New York. Powers not delegated to the United States nor prohibited by it to the States under the Constitution (Tenth Amendment) are reserved to the States respectively or to the people. Congress by terming some conduct it deems to be of such seriousness and so offensive to the community as to merit punishment as a felony is insufficient grounds to mandate automatic disbarment in New York or any other state. Each state itself must be the arbiter of what shall be the consequences of a person's conduct upon his right to practice law in that state.

To make any federal felony, even those involving no dishonesty, fraud or deceit, equal to all New York felonies judged by the people of New York to require automatic disbarment without a hearing is improper delegation. It results in providing in addition to the penalties enacted by Congress for tax offenses under the power given it to levy and collect an income tax under the Sixteenth Amendment the additional penalty of automatic disbarment. This was not envisioned under the Sixteenth Amendment. It also grants Congress the power to deny what is essentially a trial by jury in a hearing before one's peers. This violates the Sixth and Fourteenth Amendments and Article III, section 2, clause 3. It does not suffice to say appellant had his chance to jury trial in the federal proceedings. Matter of Abrams, 38 A.D. 2d 334 (1st Dept., 1972). Appellant made no conscious deliberate decision to waive a hearing in a disciplinary hearing to determine his right to practice law in New York.

In Brady v. United States, 397 U.S. 742 (1970) the court stated: "A voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." (at 757). In McMann v. Richardson

397 U.S. 759 (1970) the court noted: "Although he might have pleaded differently had later cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing or intelligent act".(at 774). But these refer to the same action in the same forum. There can be no equitable estoppel or res adjudicata doctrine extension to forclose appellant from a hearing in his right to work case because he did forego a jury trial in the criminal case. There is not just one right to trial by jury in the two actions. The perspective in each is different and the result in the later can be even more drastic than in the former. The span of life being what it is, taking away the right to practice for five years can be forever.

Disqualification is not intended to be punishment. Fleming v. Nestor, 363 U.S. 603, 616 (1959). But it is punishment of an unusual and cruel nature to do so without a hearing in the case at bar. Particularly so where the Appellate Division had agreed and granted a hearing to subject appellant to discretionary disciplinary sanctions under Subd. 2 of Section 90 of the Judiciary Law.

Also harsh and cruel was being tried in absentia by an administrative judge for the Internal Revenue Service and disbarred from practice before that agency with the intemperate and foolish opinion that appellant is a "hater" of the Internal Revenue Service and that the Service is better off with such persons not practicing before it. A further harsh and cruel result was being summarily discharged from his job as foreign negotiator for a major natural resource company on the grounds that the company could not afford to employ anyone disbarred in any jurisdiction.

Tax offenses made felonies multiplied from section 7201, taken in part from a number of sections in the 1939 Code. Now section 7206(1) is included despite a general federal perjury statute 18 USC section 1621. The Court of Appeals for the Fifth Circuit in Kolaski v. United States, 362 F 2d 847 (1966) said: "The primary purpose of section 7206(1) 'is to impose the penalties of perjury upon those who wilfully falsify their returns..." United States v. Romanow, 509 F 2d 26,28 (1st Cir., 1975) quoting Gaunt v. United States, 184 F. 2d 284, 288 (1st Cir., 1950). The Court held that the truth or falsity of a statement must be related to the time made and that Mr. Kolaski could not possibly have known or held to know

facts for a year ahead at the time of his application. Similarly, appellant could not have known that his tax liability was $83,719.47 for 1971 as stated in Count Two of the information for it took the Service until 1976 to determine that figure and it now claims that this is not the proper amount and has asserted another figure in the tax deficiency now before the Tax Court.

It is difficult to see how section 7206(1) could be deemed a crime unless the motive behind the false statement or omission on a tax return was induced by fraud and had for its purpose avoidance of tax. The Tax Court in Charles Ray Considine et al, 68 TC No. 6, decided April 21, 1977, concluded that fraud was necessary to violate the statute. The court said: "In order to show under section 7206(1) that a taxpayer 'wilfully makes a return which he does not believe to be true and correct as to every material matter' it is necessary to establish that the return as filed is not correct in a material respect, that the taxpayer at the time he filed the return did not believe it to be correct in every material respect, and that he subscribed to the return with the intent to violate 'a known legal duty'. In our view the establishment of these facts also establishes that the return as filed is a fraudulent return." The court stated that "wilfully" making a return which the taxpayer does not believe to be true and correct is proof that the return is fraudulent. The court cited its decision in 43 T.C. at p. 55 where it held that "wilfully" within the purview of section 7201 comprehends a specific intent involving the bad purpose and evil motive to evade or defeat the payment of tax.

Conviction, and even accusation, of a federal tax felony is disasterous to an attorney. There is the tendency, as shown by the majority opinion in Thies, to equate all federal felonies, and treat them the same when an attorney is involved. Others pay their penalties and return to their work.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

Appellant's case illustrates the abberant results that can follow under the per se disbarment rule. Had the hearing not been revoked, there is no reason to believe that the results would have been any different than those in Massachusetts. There is no reason to believe that being subject to disciplinary discretionary sanctions by the Appellate Division would have resulted in disbarment. This appeal therefore raises the question of the

applicability of a hearing in the discretion of the Appellate Division and the constitutionality of denial of a hearing when the court has determined that there are good and valid reasons to order one. Automatic disbarment for a federal felony not only is practiced in New York but also in Kentucky appellant was summarily disbarred without a hearing for the same offense. There is a need now to see that state bar disciplinary proceedings are conducted with due process and that there is no mandatory disbarment where the attorney proves a hearing is necessary and proper. This is demanded by the Fifth and Fourteenth Amendments of the Constitution. Hearings in such instances are as vital as jury trial to protect the Constitutional guarantees.

THE RIGHT TO A HEARING IN SOME CASES IS BASIC TO ANGLO-AMERICAN CONCEPTS OF DUE PROCESS OF LAW.

The ample historical antecedents of the right to trial by jury are applicable as well to professional hearings of the magnitude that can disbar an attorney. The right secures the individual against arbitrary conduct. Attorneys should be held to a high standard of conduct, but should not be subject to automatic disbarment for

federal felonies that are not felonious conduct under the laws of the state. In re Keogh, 25 A.D. 2d 499.

In the second Donegan case, Matter of Donegan, 265 App. Div. 774, affd 294 N.Y. 704, the court in the hearing granted allowed the attorney to prove his innocense of the offense for which he had been convicted where the record showed that the verdict was inconsistent and the proof aduced tended to show by way of mitigation that his participation did not involve any moral turpitude on his part. The District Court action is also inconsistent with any interpretation of section 7206(1) as involving fraud and the proof aduced in the Massachusetts disciplinary hearing showed there was no moral turpitude and appellant's conduct did not involve dishonesty, fraud or deceit.

CONCLUSION

This appeal raises an issue that is fundamental in importance to our system of justice. The Court has not directly considered the issue now raised by this appeal. In light of the importance of the issue it should be considered at this time.

June, 1979

Respectfully submitted,
Francis E. Rinehart
Appellant, Pro Se

Appendix A

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on August 3, 1978

Present-Hon. Vincent A. Lupiano, Justice Presiding,
Samuel J. Silverman,
Herbert B. Evans,
Myles J. Lane,
Leonard H. Sandler Justices.

FILED
AUG 3 1978
Appellate
Division, Supreme
Court, First
Department

In the Matter of Francis E. Rinehart, an Attorney.

M-474

The Committee on Grievances of The Association of the Bar of the City of New York, by James D. Porter, Jr., having presented to this Court a petition alleging that the above-named respondent, Francis E. Rinehart, who was admitted to practice as an attorney and counselor-at-law in the State of New York on June 24, 1952, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, was convicted on or about May 9, 1977 in the United States District Court of Massachusetts on charges of fraudulently filing a federal income tax return (26 U.S.C. sec. 7206(1)), a federal felony, and having petitioned this Court for an order striking the name of said respondent from the roll of attorneys and counselors-at law in the State of New York pursuant to Subdivision 4 of Section 90 of the Judiciary Law of the State of New York; and the respondent having appeared herein in person and having interposed an answer to said petition,

Now, upon reading and filing the notice of presentation of said petition, dated December 28, 1977, the petition of the Committee on Grievances of the Association of the Bar of the City of New York, and the exhibits annexed thereto, verified December 23, 1977, the affidavit of Michael Alan Schwartz, sworn to December 21, 1977, the memorandum of petitioner dated March 6, 1978, the answer of the respondent, dated February 18, 1978, as well as respondent's affidavit, sworn to February 18, 1978, and supplement to answer dated March 4, 1978, with proof of due service therof; and due deliberation having been had thereon, it is unanimously

Ordered that Hon. Daniel Gutman, of Gypsy Trail Road, Carmel, New York 10572 be and he hereby is appointed Referee in this proceeding to take testimony in regard to said charges and to report the same with his opinion thereon to this Court; and it is further unanimously

Ordered that the hearings before said Referee shall commence on a date and time to be fixed by the petitioner, after consultation with the Referee, but not later than thirty days from the date of this order, in Room 359M at the County Courthouse in the County of New York and that the minutes thereof shall be taken by an official stenographer of the Supreme Court subject to the same terms and conditions as provided by Section 314 of the Judiciary Law, as though taken before an Official Referee. No adjournment of the hearings shall be granted by the Referee without good cause and in any case the adjournment shall not exceed thirty days. All hearings shall be concluded within ninety days of their commencement, unless good and sufficient reason for an extension is reported to the Court by the Referee. The Referee shall file his report within thirty days ofthe submission to him of the material required for his determination of the proceeding, unless good and sufficient reason for an extension of time is reported to the Court by the Referee

and sufficient reason for an extension of time is reported to the Court by the Referee. Within thirty days of receipt of the report of the Referee, the petitioner shall bring on a motion before the Court to confirm or disaffirm the report of the Referee.

ENTER:

DEPUTY Clerk

Appellate Division Supreme Court -First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on AUG 3, 1978 and that the same is a correct transcript thereof, and of the whole of the original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on AUG 3 1978

Joseph J. Lucchi

Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 19, 1978

Present- Hon. Vincent A. Lupiano, Justice Presiding
Samuel J. Silverman
Herbert B. Evans
Myles J. Lane
Leonard H. Sandler Justices

In the Matter
of
Francis E. Rinehart
an Attorney.

FILED
Sep 19 1978
Appellate Division
Supreme Court
First Department

M-3009

The Committee on Grievances of the Association of the Bar of the City of New York having moved for leave to reargue Motion No. M- 474 seeking to strike respondent's name from the roll of attorneys and counselors-at-law in the State of New York and which, by order of this Court entered on August 3, q978, directed that a reference be had with respect thereto,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Michael Alan Schwartz in support of said motion, and the statement of Francis E. Rinehart in opposition thereto, and after hearing Mr. Michael Alan Schwartz for the motion, and Mr. Francis E. Rinehart, appearing pro se, opposed,

It is ordered that said motion be and the same is hereby granted and, upon reargument, this Court adhered to its original decision as contained in the order of this Court entered on August 3, 1978.

ENTER: JOSEPH J. LUCCHI
Clerk

Appellate Division Supreme Court - First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on SEP 19 1978 and that the same is a correct transcript thereof, and of the whole of the original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on SEP 19 1978

Joseph J. Lucchi
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 7, 1978

Present-Hon. Vincent A. Lupiano, Justice Presiding,

Samuel J. Silverman,
Herbert B. Evans,
Myles J. Lane,
Leonard H. Sandler, Justices.

In the Matter of Francis E. Rinehart, an Attorney.	FILED DEC 7 1978 Appellate Division Supreme Court First Department M-474A M-3009A

The Committee on Grievances of the Association of the Bar of the City of New York, by James D. Porter, Jr., having presented to this Court a petition alleging that the above-named respondent, Francis E. Rinehart, who was admitted to practice as an attorney and counselor-at-law in the State of New York on June 24, 1953, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, was convicted on or about May 9, 1977 in the United States District Court of Massachusetts on charges of fraudulently filing a federal income tax return (26 U.S.C. sec. 7206(1)), a federal felony, and having petitioned this Court for an order striking the name of said respondent from the roll of attorneys and counselors-at-law in the State of New York pursuant to subdivision 4 of Section 90 of the Judiciary Law of the State of New York; and the respondent having appeared herein in person and having interposed an answer to said petition,

And an order of this Court having been made and entered on August 3, 1978 appointing Hon. Daniel Gutman as Referee to take testimony in regard to said charges and to report the same with his opinion thereon to this Court,

And an order of this Court having been made and entered on September 19, 1978 granting petitioner's motion for leave to reargue this Court's determination directing said reference and, upon reargument, adhering to said determination,

Now, upon reading and filing the notice of presentation of said petition, dated December 28, 1977, the petition of the Committee on Grievances of the Association of the Bar of the City of New York, and the exhibits annexed thereto, verified December 23, 1977, the affidavit of Michael Alan Schwartz, sworn to December 21, 1977, the memorandum of petitioner dated March 6, 1978, the answer of the respondent, dated February 18, 1978, as well as respondent's affidavit, sworn to February 18, 1978, and supplement to answer dated March 4, 1978, with proof of due service thereof; and due deliberation having been had thereon, and upon the Opinion Per Curiam filed herein; and it appearing that respondent, Francis E. Rinehart, was convicted on or about May 9, 1977 in the United States District Court of Massachusetts on charges of fraudulently filing a federal income tax return (26 U.S.C. sec. 7206(1)), a federal felony, and upon such conviction ceased to be an attorney and counselor-at-law, it is hereby unanimously

Ordered that the orders of this Court entered on August 3, 1978 and September 19, 1978, respectively, are recalled and vacated, sua sponte, and it is further unanimously

Ordered that petitioner's motion be and the same hereby is granted to the extent of directing that the name of Francis E. Rinehart be stricken from the roll of attorneys and counselors-at-law in the State of New York; and it is further unanimously

Ordered that said Francis E. Rinehart be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, from the date of entry of this order; and it is further unanimously

Ordered that Francis E. Rinehart be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, from the date of entry of this order; and it is further unanimously

Ordered that Francis E. Rinehart be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto, from the date of entry of this order; and it is further unanimously

Ordered that said Francis E. Rinehart be and he hereby is directed to fully comply with the provisions of Title 22, Section 603. 13, of the Rules of this Court, a copy of which is annexed hereto and made a part hereof.

ENTER: JOSEPH J. LUCCHI
Clerk

Appellate Division Supreme Court - First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on DEC 7 1978 and that the same is a correct transcript thereof, and of the whole of the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on DEC 7, 1978

Joseph J. Lucchi
Clerk

Motion No. 474 - (M3009)

In re Francis E. Rinehart, an Attorney

PER CURIAM:

Respondent, admitted to practice by the Second Department on June 24, 1953, entered a plea of guilty on April 11, 1977 to one of a 2-count information charging him with fraudulently filing a Federal income tax return (26 USC sec. 7206(1)), a Federal felony.

Petitioner moved this court for an order pursuant to subdivision 4, section 90 of the Judiciary Law, directing that respondent's name be struck from the roll of attorneys of the State of New York. By order entered August 3, 1978, petitioner's motion was granted to the extent of appointing a referee to conduct disciplinary proceedings. By further motion, petitioner sought reargument seeking automatic disbarment. By order entered September 19, 1978, that motion was granted and upon reargument this court adhered to its original decision.

It was this court's view that Matter of Chu, 42 N Y 2d 490 could reasonably be interpreted to allow discretion in some cases for evaluation of the particular conduct involved in the offense.

Matter of Thies, ___ N Y 2d ___ New York Law Journal, October 2, 1978, is quite clearly to the contrary. Accordinly, our orders of August 3, 1978 and September 18, 1978 should be respectively recalled and vacated, sua sponte, and petitioner's motion should be granted to the extent of directing that respondent's name shall be stricken from the roll of attorneys and counselors-at-law in the State of New York pursuant to subdivision 4 of section 90 of the Judiciary Law of the State of New York.

All concur

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 7, 1978

Present-Hon. Vincent A. Lupiano, Justice Presiding,
Samuel J. Silverman,
Herbert B. Evans,
Myles J. Lane,
Leonard H. Sandler, Justices.

In the Matter of Francis E. Rinehart, an Attorney.	FILED DEC 7 1978 Appellate Division Supreme Court First Department M-4057

The Committee on Grievances of The Association of the Bar of the City of New York, by its attorney, Nicholas C. Cooper, having moved this Court for an order vacating the order of this Court entered on August 3, 1978 which directed a reference in the above-entitled proceeding, and striking repondent's name from the roll of attorneys and counselors-at-law in the State of New York pursuant to subdivision 4 of Section 90 of the Judiciary Law of the State of New York on the grounds that respondent, Francis E. Rinehart, has been automatically disbarred in the State of New York as a result of his conviction on or about May 9, 1977 in the United States District Court of Massachusetts on charges of fraudulently filing a federal income tax return (26 U.S.C. sec. 7206(1)), a federal felony,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Michael Alan Schwartz for the motion and Mr. Francis E. Rinehart, appearing pro se, opposed,

It is ordered that said motion be and the same hereby is denied as academic in view of the determination of this Court on Motion M-474A and M-3009A decided simultaneously herewith,

ENTER: JOSEPH L. LUCCHI
Clerk

Appellate Division Supreme Court - First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on DEC 7 1978 and that the same is a correct transcript thereof, and the whole of the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on DEC 7, 1978

Joseph J. Lucchi
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 7, 1978

Present-Hon. Vincent A. Lupiano, Justice Presiding,
Samuel J. Silverman,
Herbert B. Evans,
Myles J. Lane,
Leonard H. Sandler, Justices.

FILED
DEC 7 1978
Appellate Division
Supreme Court
First Department

In the Matter of Francis E. Rinehart, an Attorney.	M-4103

The above-named respondent, Francis E. Rinehart, having moved for an order granting either a prompt hearing in connection with the above-entitled proceeding or dismissal of said proceeding,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Francis E. Rinehart in support of said motion, and after hearing Mr. Francis E. Rinehart, appearing pro se, for the motion and no one appearing in opposition thereto,

It is ordered that said motion be and the same hereby is denied as academic in view of the determination of this Court on Motions M-474A and M-3009A decided simultaneously herewith.

ENTER: JOSEPH J. LUCCHI
Clerk

Appellate Division Supreme Court - First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof file in said office on DEC 7 1978 and that the same is a correct transcript thereof, and the whole of the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on DCE 7, 1978

Joseph J. Lucchi
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 6, 1979

Present-Hon. Herbert B. Evans, Justice Presiding
Leonard H. Sandler
Myles J. Lane
Vincent A. Lupiano
Samuel J. Silverman, Justices

FILED
FEB 6-1979
Appellate Division
Supreme Court
First Department

In the Matter
of
Francis E. Rinehart, M-4594
an Attorney.

The above named respondent having moved for leave to reargue Motions Nos. M-474A, M-3009A, M-4103 and M-4057, Motions Nos. M-474A and M-3009A having been decided by order of this court entered on December 7, 1978, which, sua sponte, recalled and vacated orderes of this Court entered on August 3, 1978 and September 19, 1978, respectively, and granted petitioner's motion to the extent of directing that respondent's name be stricken from the roll of attorneys and counselors-at-law in the State of New York, and Motions M-4103 and M-4057 having been denied as academic in view of the determination of this Court on Motions Nos. M-474A and M-3009A decided simultaneously therewith,

Now, upon reading and filing the notice of motion, with proof of due service there-

of, and the affidavit and communication of Mr. Francis E. Rinehart in support of said motion, and after hearing Mr. Francis E. Rinehart, appearing pro se, for the motion, and no one appearing in opposition thereto,

It is ordered that said motion be and the same is hereby denied.

ENTER: JOSEPH J. LUCCHI
Clerk

Appellate Division Supreme Court-First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on Feb. 6, 1979 and that the same is a correct transcript thereof, and the whole of the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on Feb. 6, 1979

Joseph J. Lucchi
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1979

Present-Hon. Leonard H. Sandler, Justice Presiding
Myles J. Lane
Vincent A. Lupiano
Samuel J. Silverman, Justices

In the Matter
of
Francis E. Rinehart, M-885
an Attorney.

The above named respondent Francis E. Rinehart having moved for leave to appeal to the Court of Appeals from the orders of this Court entered on December 7, 1978 (Orders Nos. M-4057, M-474A/ M-3009A and M-4103) and on February 6, 1979 (Order No. M-4594),

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon.

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER: JOSEPH J. LUCCHI
Clerk

Appellate Division Supreme Court-First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do herby certify that I have compared this copy with the original thereof filed in said office on APR 19 1979 and that the same is a correct transcript thereof, and the whole of the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on APR 19 1979

Joseph J. Lucchi
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 22, 1979

Present-Hon. Leonard H. Sandler, Justice Presiding
Myles J. Lane
Vincent A. Lupiano
Samuel J. Silverman, Justices

FILED
MAY 22 1979

In the Matter of

Francis E. Rinehart,
An Attorney.

M-1815

The above named respondent Francis E. Rinehart having moved for reargument of the order of this Court entered on April 19, 1979,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers having been filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER: JOSEPH L. LUCCHI
Clerk

Appellate Division Supreme Court-First Department State of New York

I, JOSEPH J. LUCCHI, Clerk of the Appellate Division of the Supreme Court First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on MAY 22 1979 and that the same is a correct transcript thereof, and the whole of the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on MAY 22 1979

Joseph J. Lucchi
Clerk

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-ninth day of March A.D. 1979.

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

Mo, No. 228
In the Matter of

Francis E. Rinehart, an Attorney.

Committee on Grievances of the Association of the Bar of the City of New York,
Respondent,
Francis E. Rinehart,
Appellant.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is dismissed and, on the Court's own motion, the appeals taken as of right from orders of the Appellate Division dated December 7, 1978 disposing of that court's motions #4103 and #4057 be and the same hereby are also dismissed, without costs, each upon the ground that said orders do not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, on this Court's own motion ,that the appeal taken as of right from the order of the Appellate Division dated December 7, 1978 disposing of that court's motions #474A and #3009A be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal from the Appellate Division order dated December 7, 1978 disposing of that court's motions #474A and #3009A be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Joseph W. Bellacosa

Clerk of the Court

Mo. No. 229

In the Matter of

Francis E. Rinehart, an Attorney.

Committee on Grievances of the Association of the Bar of the City of New York,

Respondent,

Francis E. Rinehart,

Appellant.

Motion for leave to appeal and, on the Court's own motion, the appeals taken as of right from orders of the Appellate Division dated December 7, 1978 disposing of that court's motions #4103 and #4057 dismissed, without costs, each upon the ground that said orders do not finally determine the proceeding within the meaning of the Constitution.

On the Court's own motion, the appeal taken as of right from the order of the Appellate Division dated December 7, 1978 disposing of that court's motions #474A and 3009A dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; motion for leave to appeal from said order denied. Motion for a stay dismissed as academic.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court held at Court of Appeals Hall in the City of Albany on the Third day of April A.D. 1979.

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

Mo. No. 228
In the Matter of
Francis E. Rinehart, an Attorney.

Committee on Grievances of the Association of the Bar of the City of New York,

Respondent,

Francis E. Rinehart,

Appellant.

On the Court's own motion, it is

ORDERED, that the decision and order of this Court dated March 29, 1979 be and the same hereby are each amended by adding thereto the following:

> Motion for leave to appeal, and appeal taken as of right, from an order of the Appellate Division dated February 5, 1979 denying reargument, each dismissed without costs upon the ground that said order does not finally determine the proceeding within the meaning of the Constitution.

Joseph W. Bellacosa
Clerk of the Court

Mo. No. 228

In the Matter of

Francis E. Rinehart, an Attorney.

Committee on Grievances of the Association of the Bar of the City of New York,

Respondent,

Francis E. Rinehart,

Appellant.

On the Court's own motion, the decision and order of this Court dated March 29, 1979 each amended by adding thereto the following:

"Motion for leave to appeal, and appeal taken as of right, from an order of the Appellate Division dated February 6, 1979 denying reargument, each dismissed without costs upon the ground that said order does not finally determine the proceeding within the meaning of the Constitution."

Mo. No. 490

In the Matter of

Francis E. Rinehart, an Attorney.

Committee on Grievances of the Association of the Bar of the City of New York,

Respondent

Francis E. Rinehart,

Appellant.

Motion for reconsideration of this Court's determinations dated March 29 and April 3, 1979 denied.

Supreme Court, U. S.
FILED
AUG 2 1979
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1936

-----ooOoo-----

FRANCIS E. RINEHART,

Appellant,

-v.-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

APPELLEE'S BRIEF AND MOTION TO DISMISS APPEAL

NICHOLAS C. COOPER
Attorney for Appellee
36 West 44th Street
New York, N.Y. 10036
(212)840-3550

MICHAEL ALAN SCHWARTZ
36 West 44th Street
New York, N.Y. 10036
Of Counsel

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1936

FRANCIS E. RINEHART,

Appellant,

-v.-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

PRELIMINARY STATEMENT

Appellee moves to dismiss the appeal of appellant from a final order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered the 7th day of December, 1978, striking his name from the roll of attorneys in the State of New York, based upon his federal felony conviction for violating 26 U.S.C. §7206(1).

STATEMENT OF THE CASE

Appellant was admitted to the practice of law in the State of New York on June 24, 1953, at a term of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

On May 9, 1977, appellant was convicted, in the United States District Court for the District of Massachusetts of making and subscribing to a joint federal income tax return which was verified by a written declaration that it was made under the penalties of perjury, which said joint income tax return he did not believe to be correct as to every material matter, in violation of Title 26, United States Code, Section 7206(1). The appellant was sentenced to a term of imprisonment of one year, the execution of which sentence was suspended. Appellant was placed on probation for a period of one year, and was ordered to pay a fine of five thousand dollars ($5,000.00).

On December 7, 1978, by order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, appellant's name was struck from the roll of attorneys in the State of New York, pursuant to New York Judiciary Law §90, subd. 4, as it then existed,[1] Matter of Rinehart, 65 A.D.2d 63 (1st Dept. 1978). The New York Court of Appeals, the State's highest appellate court, denied appellant leave to appeal from the order striking his name from the roll of attorneys, and dismissed appeals taken by him on March 29, 1979. Matter of Rinehart, 46 N.Y.2d 1036(1979).

[1]Since the time of the order striking appellant's name from the roll of attorneys, New York Judiciary Law §90 has been amended, and may provide a basis for appellant to seek further remedies within the State.

POINT ONE

APPELLANT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The appeal brought by appellant is similar to applications for review by this Court made by other persons who were stricken from the roll of attorneys in New York under the same authority as in appellant's case. Thies v. Joint Bar Association Grievance Committee, 61 A.D.2d 1037 (2d Dept. 1978), aff'd 45 N.Y.2d 865(1978), amended remittitur 45 NY2d 924 (1978), appeal dismissed ____ U.S. ____, 99 S. Ct. 2154 (1979); Brasco v. Joint Bar Association Grievance Committee, 62 A.D.2d 1006 (2d Dept. 1978), leave to appeal denied 45 N.Y.2d 711 (1978), cert. denied ____ U.S. ____, 99 S.Ct. 1993 (1979) Podell v. Joint Bar Association Grievance Committee, 61 A.D.2d 1019 (2d Dept. 1978), leave to appeal denied 45 NY2d 711(1978), cert. denied ___ U.S. ____, 99 S.Ct. 1992 (1979); Fayer v. Joint Bar Association Grievance Committee, 63 AD2d 709 (2d Dept. 1978), leave to appeal denied 45 N.Y.2d 708(1978), cert. denied

____U.S.____, 99 S.Ct. 847(1979); Rosenberg v. Joint Bar Association Grievance Committee, 62 A.D.2d, 1065(2d Dept. 1978), leave to appeal denied 44 N.Y.2d 648, cert. denied ____U.S.____, 99 S.Ct. 327(1978); Davis v. Joint Bar Association Grievance Committee, 60 A.D.2d 613(2d Dept. 1977), leave to appeal denied 44 N.Y.2d 641 (1978), cert. denied ___ U.S.____ 99 S.Ct. 217 (1978); Peltz v. Joint Bar Association Grievance Committee, 60 A.D.2d 587(2d Dept. 1977), leave to appeal denied 43 N.Y.2d 646, appeal dismissed 43 N.Y.2d 844(1978), cert. denied 436 U.S. 926 (1978).

In each of these cases this Court denied the disbarred attorney review of his State disbarment proceedings. In Davis and Rosenberg the attorneys were convicted of felony income tax evasion under 26 U.S.C.§7201 as opposed to appellant's conviction for false and fraudulent filing of income tax returns in violation of 26 U.S.C. §7206(1). If anything, appellant's

conviction evidences conduct involving more serious professional misconduct inasmuch as the statute of which he was convicted of violating has been held to be a perjury statute. United States v. Levy, 533 F.2d 969(5th Cir. 1976); United States v. Romanow, 509 F.2d 26(1st Cir. 1975).

Appellant raises no issues to distinguish his case from those aforementioned cases in which this Court recently denied appellate review.

Appellant, in his own brief, concedes that there is no substantial federal question, when he states that "each state itself must be the arbiter of what shall be the consequences of a person's conduct upon his right to practice law in that state." (Appellant's Brief, p. 36.)

This Court has long recognized that an attorney convicted of a felony "will be struck off the roll as of course, whatever the felony

may be, because he is rendered infamous." Ex parte Wall, 107 U.S.265, 273(1882).

Except in narrowly limited circumstances, this Court will not sit in judgment on State disbarments. Theard v. United States, 354 U.S. 278 (1957). See also Selling v. Radford, 243 U.S. 46(1917). It is submitted that appellant has not set forth such circumstances.

New York has determined that attorneys, as officers of the Courts, "must observe the canons of ethics and moral proprieties at the very least to the extent that they do not stand convicted of a federal felony." Matter of Schiffman, 62 A.D.2d 438(1st Dept. 1978). It has been held that the application of New York disciplinary procedures, as in the instant case, in effecting such a State public policy, does not violate the Constitution of the United States. Thies v. Joint Bar Association Grievance Committee, 45 N.Y.2d 865, amended remittitur 45 N.Y.2d 924(1978), appeal dismissed

___U.S.___, 99 S.Ct. 2154(1979).

"Membership in the bar is a privilege burdened with conditions", Matter of Rouss, 221 N.Y. 81, 84(1917). One of those conditions is that an attorney not only obey the law, which is the mandate of every citizen, but that he uphold the laws. In having committed the felony for which he was convicted, appellant violated even the lesser standard imposed upon the ordinary citizen. Having violated his oath as an attorney to such a degree as to have been convicted of a federal felony, appellant was disbarred by the State in the proper exercise of a State function.

Accordingly, appellant having failed to present a substantial federal question, the appeal should be dismissed.

POINT TWO

APPELLANT WAS NOT DEPRIVED OF ANY CONSTITUTIONALLY PROTECTED RIGHT BY THE APPLICATION OF THE NEW YORK AUTOMATIC DISBARMENT STATUTE.

New York's automatic disbarment statute has been in existence for almost a century. [See New York Laws of 1890, ch. 528. See also Matter of E, 65 How. Pr. 171(1879); Matter of Niles, 48 How. Pr. 246, 251(1875) Robinson, J. concurring].

It evidences a New York public policy which declares that those attorneys who so seriously violate their oaths as to be convicted as felons are unfit to practice law in the State. The philosophical basis underlying that public policy was stated most succinctly by Judge Matthew Jasen of the New York Court of Appeals as follows:

> "To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice' but instead would invite scorn and disrespect for our rule of law."

Matter of Mitchell, 40 N.Y.2d 153, 156(1976).

Due process does not require that a hearing be held in the disciplinary forum in every case before discipline may be imposed. Where an attorney commits a felony "a court has power to exercise summary jurisdiction." Ex parte Wall, supra.

Appellant claims that his plea of guilty in the Federal court was predicated upon his belief that he would not be subject to New York Judiciary Law, §90, subd. 4, providing for automatic disbarment.

What Appellant argues here is that had he anticipated the decision of the Court of Appeals in Matter of Chu, 42 N.Y.2d 490 (1977), he would not have entered his plea of guilty. Appellant assumes too much in this argument of harm. He assumes that he would not have been disbarred absent Chu. Yet disbarment was always a discretionary disciplinary option open to the Court under New York Judiciary Law, §90, subd. 2. Matter of Levy, 37 N.Y.2d 279 (1975).

The fact that Appellant pleaded guilty, as opposed to going to trial, does not render his conviction ineffectual for purposes of the automatic operation of Judiciary Law §90, subd. 4. Matter of Whitestone, 38 A.D.2d 92(1st Dept. 1972); In re Hendrickson, 267 App. Div. 772(2d Dept. 1943); In re Gunner, 180 App. Div. 923(1st Dept. 1917). Appellant had an absolute right to a trial by Jury. U.S. Const. Amend. VI.

Appellant, by claiming "detrimental reliance" upon his belief as to the probable consequences of his conviction at the time of the entry of his plea, attempts to vitiate his felony conviction by collaterally attacking it in the disciplinary forum. This he may not do. Matter of Levy, supra.

Appellant's claim that his plea may have been made involuntarily by his reliance on his belief that he would not be automatically disbarred, in addition to being an improper attack upon his conviction, is not supported by the law. As this Court has said: "A voluntary plea of guilty intelligently made in the light of the then

applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Brady v. United States, 397 U.S. 742, 757 (1970)

In another opinion, this Court noted:

> Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing or intelligent act. [McMann v. Richardson, 397 U.S. 759, 774 (1970)].

There is no doubt here that the plea was intelligent and knowing. In any event, such a collateral attack on the felony conviction is impermissible in the disciplinary forum and may be heard only in the criminal forum.

Appellant's automatic felony disbarment does not deprive him of due process of law. It is predicated upon his Federal conviction, at which time he had a full and complete opportunity to have the government prove its case against him "beyond a reasonable doubt far more stringent

than the standard of 'fair preponderance' applicable at a disciplinary hearing," Matter of Kahn, 38 A.D.2d 115(1st Dept. 1972), aff'd. 31 N.Y.2d 752. "Respondent's constitutional guarantee of due process was safeguarded by his [right to a] jury trial and appellate review," Matter of Abrams, 38 A.D.2d 334, 336 (1st Dept. 1972). That he failed to avail himself of these rights by a conscious, deliberate choice on his part does not result in a denial of due process.

Having pleaded guilty, Appellant voluntarily, knowingly, and intelligently chose not to risk his chances at trial and to litigate the question of his guilt, but exacted a plea bargain. He should not be permitted to assert that he was prejudiced by a deprivation of constitutional rights which he waived by his guilty plea. People ex rel Woodruff v. Mancusi, 41 A.D.2d 12(4th Dept. 1972).

CONCLUSION

The appeal should be dismissed.

Dated: New York, New York
July 30, 1979

Respectfully submitted,

NICHOLAS C. COOPER
Attorney for Appellee
36 West 44th Street
New York, New York 10036
(212) 840-3550

MICHAEL ALAN SCHWARTZ
Of Counsel
36 West 44th Street
New York, New York 10036

To: Francis Rinehart
1025 Fifth Avenue
New York, N.Y. 10028

Supreme Court, U. S.
FILED
AUG 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1936

FRANCIS E. RINEHART,

Appellant,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS AND THE SUPREME COURT, APPELLATE DIVISION OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS

FRANCIS E. RINEHART
1025 Fifth Avenue
New York, New York 10028
(212) 861-6419
Appellant Pro Se

August, 1979

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78 - 1936

FRANCIS E. RINEHART, Appellant,

- v. -

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. Appellee.

PRELIMINARY STATEMENT

Appellee has filed a "Brief and Motion to Dismiss Appeal" which disputes the jurisdiction of this Court to hear this case, makes another non-differing statement of the case, and gives two reasons why the Court has no jurisdiction. Neither "point" raises any new facts or law nor covers any matter not covered in the Jurisdictional Statement. Both ignore the true tenets of Theard v. United States, 354 U.S. 278 (1957) that disbarment is serious, that common sense must be used, and conduct and circumstances must somewhere be considered for there to be fairness and due process of law.

Jurisdiction of the appeal is conferred upon this Court by Title 28, U.S.C. section 1257(2). Validity of the Judiciary Law of New York, section 90, subd. 4, is drawn into question on the ground of its being repugnant to the Constitution and the decision appealed from is in favor of its validity.

Jurisdiction to review a case from a state court has come to be considered as dependent not merely upon an appellant's claim of a substantial federal question but upon the Court agreeing that one exists.

Since appellant's claim is clearly not frivolous or utterly lacking in merit, appellee's first point is that review of the federal question is foreclosed by the Court's prior decisions denying appeal and that there are no grounds for reconsidering those decisions of insubstantialty. In point "Two", appellee appears to assert there is no federal question at all for appellant had his chance at due process in prior criminal proceedings and failed to take it and the denial by an automatic disbarment statute of the right to a disciplinary hearing ordered by the Appellate Division where one is needed is not a right that is protected by the Constitution.

POINT ONE

APPELLANT DOES PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Fourteenth Amendment of the Constitution, section 1, which became effective in 1868, includes the following provision:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant has been deprived of his "liberty" and "property" by New York without due process of law. As interpreted by the New York Court of Appeals to mandate that the Appellate Division withdraw a hearing it deemed necessary and automatically disbar appellant, The Judiciary Law, Section 90, subdivision 4, has been "made" and "enforced" to abridge the privileges and immunities of appellant, a citizen of the United States. Appellant has also been denied the equal protection of the laws. These are substantial federal questions.

Appellee cites seven instances in which this Court denied review of state debarment proceedings and asserts that appellant has raised no issue to distinguish his case from these. (Appellee's Brief, p. 4,5). Appellee puts appellant in rough company and says his conduct was worse. In appellee's opinion omitting income received and returned in the same year from a tax return is worse than tax evasion and fraud. Appellant finds no basis for such an opinion. Appellee concludes that appellant's conduct violated a "perjury statute" and that this evidences more serious professional misconduct than tax evasion.

As a matter of Federal law, it may be that section 7206(1) involves "perjury", although it provides a lesser penalty than the perjury statute, 18 U.S.C. section 1621. But the Massachusetts Bar hearing committee agreed with the sentencing judge "that this case is not the typical tax fraud case, but is more a case of an inordinately stubborn taxpayer involved in a feud with the Internal Revenue Service". The committee did not "believe that he engaged in conduct involving

dishonesty, fraud or deceit", and it seems clear that the sentencing judge treated the statute as imposing liability without fraud. Accordingly, the Supreme Judicial Court of Massachusetts accepted the recommendation of the hearing committee. Evasion of tax would appear the only logical purpose for perjury on a tax return, and appellant did not do this.

The Appellate Division, in each of the seven cases cited by appellee, itself exercised the discretionary disciplinary option then open to it under the Judiciary Law, section 90, subdivision 2, and held that automatic disbarment under subdivision 4 was proper considering the conduct and circumstances in each case.

In appellant's case, however, the Appellate Division twice rejected appellee's motion for automatic disbarment and held that the conduct and circumstances justified a hearing to take testimony in regard to the charges and to report the same with opinion of the referee thereon to the court. This was after Matter of Chu, 42 N.Y.2d 490, cited in the seven cases to deny a hearing and disbar.

It was the Appellate Division's view that Chu could reasonably be interpreted to allow discretion to it in appellant's case for evaluation of the particular conduct involved.

In Thies, the "Appellate Division held that conviction in federal court of the felony of assault upon a federal officer warrants disbarment."

In Brasco, the attorney sought a stay pending motion for a new trial. The Appellate Division held that the conviction warranted disbarment.

In Podell (Driesman), section 7206(2) was violated by aiding and counselling a false return and the Appellate Division on motion vacated an order for disciplinary proceeding and granted a motion to strike the attorney's name from the rolls.

In Fayer, the Appellate Division granted a motion to strike where the felony was violation of 18 U.S.C. section 1623 by false testimony as a witness and attempting to influence a witness not to testify.

In Rosenberg, the Appellate Division granted a motion to strike where the offense was an attempt to evade and defeat a large part of tax owed by preparing a false return, violating both 26 U.S.C. sections 7201 and 7206(1).

In Davis and Peltz, both in 1978, the Appellate Division granted a motion to disbar and withdrew hearings granted. This was after the Chu decision in 1977.

Only in appellant's case did the Appellate Division recall its order, made and reaffirmed, because it was compelled to do so by the majority opinion in Thies directly overruling what had long been the law of the state, that only where an attorney is convicted of a crime deemed to be a felony under New York law is the discretion of the Appellate Division foreclosed and automatic disbarment without a hearing is mandatory.

POINT TWO

APPELLANT HAS BEEN DEPRIVED OF HIS CONSTITUTIONALLY PROTECTED RIGHTS BY THE APPLICATION OF THE NEW YORK AUTOMATIC DISBARMENT STATUTE.

Certainly appellant's right to work in the profession he has chosen and in which he has qualified is both a "liberty" and "property" guaranteed by the Constitution, and is one of the "privileges" or "immunities" of United States citizens. No State may make or enforce any law which abridges those privileges or immunities nor shall any State deprive appellant of his liberty and property in the practice of his profession without due process of law nor deny to appellant, a person within its jurisdiction, the equal protection of the laws. Nor can appellant be denied a hearing where the state court responsible for removal from practice has found it necessary.

Certainly also a state in the exercise of its retained and proper police power can set reasonable requirements for the disbarment of an attorney in its courts. The state legislature may require automatic disbarment for conduct it has deemed to be felonious and enacted a felony statute.

However, conduct it has not so deemed may not automatically disbar an attorney until either the legislature or the court in charge of disbarment determines it to merit disbarment. The legislature may not delegate to Congress the duty it has to determine what conduct merits automatic disbarment. It may, however, delegate this duty to the state court to which it has committed the responsibility for removal from practice, provided it leaves such court with discretion to determine the nature of the offense and the circumstances so that automatic disbarment is mandatory only absent compelling mitigating circumstances of substantial merit.

The New York Legislature never intended to do otherwise. Two bills were passed by both houses immediately after the Thies case to overrule the decisions in Thies and Chu which held that the existing provisions of the Judiciary Law mandated the disbarment of an attorney upon conviction of a felony in a jurisdiction other than New York even if the offense would not constitute a felony under New York law. On July 15, 1979, the Governor approved Assembly Bill 6252-A to amend the provisions of the

Judiciary Law relating to automatic disbarment of an attorney upon his conviction of a felony to limit the application of such provisions to a conviction of an offense which constitutes a felony under the laws of New York. The Assembly Bill, in addition, establishes procedures for the automatic suspension of an attorney convicted of a felony under the laws of New York, or of a "serious crime" as that term is defined in the bill. "Following suspension, a hearing would be held to determine whether disbarment or other disciplinary action is warranted. Assembly Bill 6252-A, therefore, will not only prevent the automatic disbarment of an attorney without sufficient cause, it will also provide the public with necessary protection against attorneys who have been convicted of serious criminal offenses." (Press Release, July 13, 1979, Governor Hugh L. Carey).

Had appellant litigated the tax case as appellee says he should have, appellant may have proven in that case, as he did to the Massachusetts Board of Bar Overseers, that he "possesses moral qualifications to practice law". (Findings and Recommendations of a panel of the Board of Bar Overseers,

April 9, 1979). But it cannot suffice for due process of law that because he did not he may be denied a hearing granted him by the Appellate Division regardless of the nature of his offense or his actual conduct, which was void of dishonesty, fraud or deceit.

CONCLUSION

The motion to dismiss appeal should be denied.

Respectfully submitted,

FRANCIS E. RINEHART
Appellant Pro Se

August 1979